



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

YALE LAW JOURNAL

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,

LESLIE E. HUBBARD,

ROBERT H. GOULD,

ARCHIBALD W. POWELL,

GEORGE ZAHM.

Associate Editors:

WILLIAM H. JACKSON,

ROBERT L. MUNGER,

CORNELIUS P. KITCHEL,

HENRY H. TOWNSHEND,

GEORGE A. MARVIN,

THOMAS J. WALLACE, JR.

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 1341, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

We are in receipt of the text of the opinion handed down on May 31, 1899, by the Supreme Court of the Hawaiian Islands in reference to the applicability of provisions of the United States Constitution to the newly acquired country. The cases are those of *Peacock & Co. v. Republic of Hawaii*, and *Lovejoy & Co. v. Republic of Hawaii*.

These were actions for the recovery of money paid under protest by the plaintiffs as custom duties at Honolulu since the annexation of Hawaii to the United States. The substantial question raised was whether the Hawaiian government could continue after the annexation of the islands to the United States to collect duties at the rates prescribed by the Hawaiian laws in force immediately before annexation. The joint resolution which provided for the annexation vested this power in the Hawaiian government. The contention of the plaintiffs was that immediately upon the cession of the islands the same became so far a part of the United States as to be subject to the provisions of the Constitution, and that, therefore, the legislation imposing the levy of customs duties as then existing under the Hawaiian laws was unconstitutional and void, being opposed to Article I, Sec. 8, "All duties and excises shall be uniform throughout the United States," and Article I, Sec. 9, "Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." The court refused to sustain this contention, holding that under the then existing circumstances, the provisions of the United States Constitution were inapplicable to the Islands.

The line of argument adopted by the court was summed up by the same court in a subsequent opinion (*Republic of Hawaii v. G. L. Edwards*), as follows: "Assuming that various provisions of the Constitution of the United States, in regard to which there is great difference of opinion, extend for the

purposes of ordinary or permanent Congressional legislation to territory belonging to the United States, as well as to the States proper, they do not necessarily extend of their own force to newly acquired territory immediately upon its acquisition, but that the laws and government of its ceded territory continue for such reasonable time as may, in the judgment of the political department of the government, be deemed requisite for the enactment of suitable legislation for the new territory in conformity with the provisions of the Constitution."

In arriving at this conclusion the court draws a distinction between territory belonging to the United States after Congress has enacted such legislation as amounts in effect to a declaration by that branch of the government that the territory is to be henceforth regarded as fully incorporated into the American Empire and territory, in regard to which no such representation has been made, and which may be regarded, at least for certain purposes, as in a transition state or only inchoately annexed, holding that the application of the Constitution, an instrument framed by reasonable men and with reference to recognized principles, depends upon the circumstances of the case. "The Constitution contemplates the acquisition of territory by cession or by conquest, and whether one of these methods or the other is pursued, the recognized and appropriate rules may be followed. It is a recognized principle of municipal and international law that, after the analogy of a deed, a change of sovereignty does not ordinarily take effect until delivery."

The court then discusses the question of acquisition by conquest, arriving at the conclusion that the Constitution would not extend to the conquered territory *ex proprio vigore*. The opinion proceeds: "If the Constitution would not extend forthwith to newly acquired territory in case of conquest and treaty of peace, is there any reason why it should in case of an acquisition by cession alone? * * * If the Constitution is not in force in the newly acquired territory at once, it is not because of necessity—a necessity with reference to which and to the recognized principles growing out of it, the Constitution must be presumed to have been framed. Can it be said that there is not the same necessity in the case of cession as in the case of conquest, because in the former case time may be taken to provide for a change of laws and government before the cession is made? Could it not be said with equal force that such time might be taken before the ratification of a treaty of peace in case of conquest?"

The plaintiffs, however, contended that Congress has already acted in this case—reference being had to the clause in the joint resolution concerning the customs laws. To this the court replies:

"Now, in the first place, the mere fact that Congress has taken some action in regard to newly acquired territory, is not sufficient to indicate that in its opinion such territory has become or ought to be considered fully incorporated into the American Empire. If annexation is accomplished by joint resolution, that of itself is action by Congress with reference to the territory acquired. That is not sufficient. There must be legislation to such extent, or of such character as to indicate that in the opinion of Congress the territory has become essentially a part of the United States. The legislation must be something more than of a mere temporary or provisional character. If the clause of the joint resolution referred to indicates anything, it indicates, especially when taken in connection with the other clauses, that Congress was of the opinion that it was not then in a position to make permanent provision for these islands, and that it needed further light and further time to enable it

to do so. The legislation continuing the Hawaiian customs relations cannot be held unconstitutional and void, as positive independent legislation in controversion of the clause of the Constitution in question. The joint resolution must be treated as a whole. It is an attempt to annex these islands to a certain extent or for certain purposes for the time being, full annexation to be contemplated at a later period."

A general summary of the opinion may be stated as follows: That the Constitution of the United States was framed by reasonable men to provide for the requirements of a sovereign nation and must be construed with reference to recognized principles; that construed with reference to those principles, all its provisions that may be ultimately applicable to acquired territory do not necessarily extend to it of their own force immediately upon conquest, or the ratification of a treaty or the passage of a joint resolution of annexation; that this is well settled in certain cases, as, for instance, in case of cession until transfer of possession, and in case of conquest until treaty of peace; that there is much reason to believe that it may be so even after transfer of possession or treaty of peace until such action is taken by Congress as indicates that incorporation of the new territory into the United States is regarded as completed; that there is no distinction in this respect founded in reason between a cession in a treaty of peace and a cession by treaty in time of peace, or between a cession by treaty and a cession in pursuance of a joint resolution, and that the power to acquire by treaty or joint resolution as well as the power to acquire by conquest carries with it all necessary and proper incidental powers, one of which may be the temporary continuation of the laws of the acquired territory, though inconsistent with certain specific provisions of the Constitution, the duration of which temporary status is within the discretion of Congress.

The case of *Hawaii v. G. L. Edwards*, referred to in the Peacock case, was one of a criminal nature. The defendant having been convicted of a crime, sued out a writ of error based on the ground that the trial and conviction were illegal because the indictment had been found a true bill by the circuit judge, as required by the Hawaiian statutes, and not by a grand jury as supposed to be required by the Fifth Amendment of the Constitution of the United States, and because the verdict was rendered by ten only of the twelve petit jurors as permitted by Hawaiian statutes, and was not unanimous as supposed to be required by the Sixth Amendment of the said Constitution. In the decision of this case the court adopted substantially the same line of reasoning as in the Peacock case. Though both of these cases involved the construction of the joint resolution of annexation, in the Peacock case, which involved the constitutional provision with reference to uniformity of customs duties, it was expressly declared in the joint resolution that the customs relations of these islands with the United States and other countries should continue until the United States customs laws should be extended to these Islands, while in the present case there is no clear declaration one way or the other. One clause in the joint resolution provides: "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United

States, shall remain in force until the Congress of the United States shall otherwise determine." The defendants argued that on the principle of *expressio unius exclusio alterius*, the expression of an intention to continue in force those Hawaiian laws which were not inconsistent with the Constitution of the United States implies an intention to discontinue those laws which were inconsistent with the Constitution. The opinion of the court, in which they refuse to sustain this contention, may be summarized as follows:

That the argument is founded on inference, and being so founded, it must take into consideration not only the inference from the particular clause referred to, but all the inferences that may be deduced from the joint resolution as a whole and from the circumstances under which it was adopted; that the inference is not a necessary one, it being subject of modification or rebuttal by other inferences; that the continuation of certain Hawaiian laws does not of necessity repeal the remainder; that, as decided in the Peacock case, the municipal legislation of Hawaii would continue in force temporarily in the absence of any declaration on the subject one way or the other, therefore to make the inference in question would be to hold that the sentence of the joint resolution under consideration was intended to be, not, as it purports, an affirmative declaration of what should continue, but an indirect repeal of what was not declared to continue, and that on general principles such a construction should not be favored; that this general principle finds support in the course pursued in reference to other repeals in the joint resolution, the same directly repealing certain portions of the Hawaiian law (Chinese immigration, and in the paragraph in question, Hawaiian treaties); that this view finds further support in the general intentions of Congress as shown by the resolution as a whole, inasmuch as Congress did not attempt to go into particulars except with reference to a very few matters with regard to which there was special reason for making particular provision; that it is improbable, in view of this general intention manifested in the joint resolution as a whole; that Congress intended by the incidental indirect clause in question to repeal large and most important portions of Hawaiian laws blindly, without any knowledge of the result and without substituting other necessary provisions in their places; that it is obvious from the decision in the Peacock case that there is at least much reason to believe that Congress did not intend to extend the Constitution in all its fullness to these islands immediately, and that the construction contended for should not be put upon the clause in question if that can be avoided; that this construction can be avoided in that the clause in question is a declaratory as distinguished from a remedial provision—declaring what the rule would be in the absence of any provision on the subject, and that inasmuch as this provision (continuing Hawaiian laws) was inserted it was necessary for the sake of truth and exactness to name the exceptions.